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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ITHACA INDUSTRIES, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* ON BEHALF OF SALOMON INC IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* ON BEHALF OF SALOMON INC IN SUPPORT OF PETITIONER

Salomon Inc ("Salomon") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by Ithaca Industries, Inc. ("Ithaca") in this case. Both parties have consented to Salomon's filing a brief *amicus curiae*, and letters from counsel for the parties indicating such consent have been filed with the Clerk.

INTEREST OF *AMICUS CURIAE*

The interest of Salomon in this case arises from the fact that Salomon anticipates that it will very shortly have a substantial controversy with the Internal Revenue Service (the "Service") concerning the propriety for fed-

eral income tax purposes of the same type of deduction that is at issue in this case, *i.e.*, an amortization deduction for the cost of an acquired workforce-in-place. Thus, Salomon is potentially affected by the decision in this case, and has a keen interest in this Court's review of the Fourth Circuit Court of Appeals' decision misapplying the Supreme Court's holding in *Newark Morning Ledger Co. v. United States*, —— U.S. ——, 113 S. Ct. 1670 (1993) ("*Newark Morning Ledger*"), and apparently holding, contrary to *Newark Morning Ledger*, that as a matter of law an acquired workforce-in-place does not have a determinable useful life and is not amortizable under Section 167 of the Internal Revenue Code (the "Code"), 26 U.S.C. § 167 (1988).

Salomon is a publicly-traded Delaware corporation that is the parent company of Salomon Brothers, Inc., the securities broker-dealer, and affiliated companies. Salomon and the members of its affiliated group file a consolidated federal income tax return with the Internal Revenue Service Center at Holtsville, New York, and are subject to the audit jurisdiction of the Manhattan District Director of the Service.

In 1981, Phibro Corporation ("Phibro"),[1] a major commodities dealer that was then engaged on a worldwide basis in the marketing and distribution of ferrous and non-ferrous minerals and metals, fertilizers, sugar, crude oil and oil products and other raw materials, acquired in a taxable transaction (through a newly-formed subsidiary) the assets of Salomon Brothers, a prominent securities broker-dealer and international investment banking firm. Among the assets acquired by Phibro were not only the securities and bond positions of Salomon Brothers (the gross fair market value of which at the time amounted to approximately $80 billion), but also a unique and highly skilled workforce-in-place that con-

[1] Shortly after the acquisition, Phibro changed its name to Phibro-Salomon Inc. In 1984, the corporation adopted its present name of Salomon Inc.

sisted of securities traders, an institutional salesforce, investment bankers, research experts, and back-office personnel.[2]

Although in the years after the acquisition Salomon did not report amortization deductions for federal income tax purposes for the cost of the acquired workforce-in-place, in view of the Supreme Court's holding in *Newark Morning Ledger* it now intends to file a claim for refund on the basis that such deductions are allowable for the years beginning in 1982. The subject of the allowability of such a claim for refund has already been raised with the Manhattan District of the Service, and Salomon anticipates that the propriety of any such claim will be disputed by the Service. Given the substantial value of the workforce acquired as part of the 1981 asset acquisition, the amount of tax liability at issue related to amortizable deductions for the cost of the workforce-in-place will be sizable.

The Fourth Circuit's decision in this case is the only court of appeals decision addressing the deductibility of the cost of an acquired workforce-in-place under Section 167 of the Code. Clearly, the decision will carry considerable (if not controlling) weight with the Service in determining its position regarding Salomon's claimed deductions for the cost of an acquired workforce-in-place. To the extent the Fourth Circuit's decision holds—contrary to *Newark Morning Ledger*—that an acquired workforce-in-place cannot be amortized under Section 167 as a matter of law, reliance on that holding by the Service could result in Salomon's being precluded outright from showing under *Newark Morning Ledger* that its acquired workforce-in-place has "an ascertainable value and a limited useful life, the duration of which can be ascertained with reasonable accuracy." —— U.S. at ——, 113 S. Ct. at 1683.

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[2] At the time of the acquisition, Salomon Brothers operated as a partnership. Virtually all of Salomon Brothers' partners were included in the workforce-in-place acquired by Phibro.

Accordingly, Salomon has a lively interest in the proper application of this Court's holding in *Newark Morning Ledger* as to the question of whether the cost of an acquired workforce-in-place can be an amortizable deduction under Section 167, and thus has strong reason to urge this Court to review the Fourth Circuit's decision in this case.[3]

ARGUMENT

Salomon agrees with the argument set forth in petitioner Ithaca's petition for a writ of certiorari that the Fourth Circuit's decision in this case is contrary to *Newark Morning Ledger* and that review by this Court is therefore warranted. The Fourth Circuit's decision creates confusion and uncertainty regarding the proper application of *Newark Morning Ledger* to types of intangible assets other than the specific assets at issue in that case, *i.e.*, newspaper subscriptions. Such confusion and uncertainty is to the detriment of Salomon and other taxpayers, as well as to lower courts required to apply *Newark Morning Ledger* to different types of intangible assets, such as an acquired workforce-in-place.

In *Newark Morning Ledger*, the Supreme Court clarified the proper application of Section 167 of the Code (and the related Treasury Regulation)[4] to intangible assets asserted by the Service to constitute goodwill but proven to have an ascertainable value and determinable useful life. The Court held that, regardless of whether an intangible asset assertedly is " 'within the core of the concept of goodwill' " or "its value is related to the expectancy of continued patronage," the asset is depreciable

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[3] Section 197 of the Internal Revenue Code, 26 U.S.C.A. § 197 (West Supp. 1994), enacted as part of the Revenue Reconciliation Act of 1993, now permits taxpayers to amortize the cost of acquiring certain intangible assets—including "workforce-in-place"—over a 15-year period. That provision, which generally applies to property acquired after the date of enactment (*i.e.*, August 10, 1993), does not cover Salomon's situation, which involves an acquisition that occurred in 1981.

[4] Treas. Reg. § 1.167(a)-3, 26 C.F.R. § 1.167(a)-3 (1993).

under Section 167 if it "has a value that wastes over an ascertainable period of time." —— U.S. at ——, 113 S. Ct. at 1680-81 (citation omitted). Thus, after *Newark Morning Ledger*, mere characterization of an intangible asset as "goodwill" will not determine whether it is depreciable; instead, a taxpayer is entitled to show that the asset has "ascertainable value and a limited useful life, the duration of which can be ascertained with reasonable accuracy." —— U.S. at ——, 113 S. Ct. at 1683.

In this case, the Fourth Circuit construed *Newark Morning Ledger* so narrowly that it denied Ithaca any opportunity to make the very showing now permitted under that decision—that the assembled workforce acquired by Ithaca had an ascertainable value and a determinable useful life. First, the Court of Appeals, by stating that an employee "is not a subscription" nor has the characteristics of a subscription, 17 F.3d 684, 690, effectively held that the rule set forth in *Newark Morning Ledger* applied only to the type of intangible asset at issue there, *i.e.*, newspaper subscriptions, and not to other types of intangible assets such as a workforce-in-place. Then, to the extent the Court of Appeals even considered *Newark Morning Ledger* as possibly applicable to an acquired workforce-in-place, it preempted the evidentiary inquiry required thereunder by holding as a matter of law that Ithaca cannot show with reasonable accuracy that its workforce had an ascertainable value and a limited useful life. Even though the Tax Court had not even addressed this issue (having held in the first place that a workforce is not a wasting asset), the Court of Appeals refused to remand to the Tax Court for it to consider evidence and make findings on the issue, holding that *no* evidence that Ithaca might offer could establish the useful life of Ithaca's workforce with reasonable accuracy. *Id.* at 689-90. Providing little explanation for this holding—but rather stating conclusively that "there can be no defensible estimation of the duration of any one person's employment, nor of the useful life of the workforce of which he or she is a part," *id.* at 689, and that the characteristics of Ithaca's workforce "suggest no sufficiently accu-

rate means of estimating its useful life," *id.* at 690—the Court of Appeals ruled as a matter of law that Ithaca's workforce was not an amortizable asset.

To the extent that the Fourth Circuit's decision stands for the broad proposition that certain intangible assets—such as an acquired workforce-in-place—are inherently incapable of having a determinable useful life and therefore cannot be amortized and deducted under Section 167, the decision is clearly at odds with the Supreme Court's ruling in *Newark Morning Ledger.* If allowed to stand, the decision will cause confusion anew regarding the amortization of acquired intangible assets for all years prior to the enactment in 1993 of Section 197,[5] an area of law that Salomon and many other interested taxpayers believed had been largely clarified by the Supreme Court's ruling in *Newark Morning Ledger.*

CONCLUSION

Because of the confusion and uncertainty likely to result from the Fourth Circuit's decision in the case, Salomon agrees with petitioner that review of the decision by this Court is necessary and supports the petition for a writ of certiorari.

Respectfully submitted,

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[5] *See* note 3 *supra.*